FILE COPY

No. [redacted] 169

Office Supreme
F I L
SEP 19
CHARLES EL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

JAMES W. ROTHWELL, WILLIAM J. MICHEL, ET AL., RECEIVERS OF EMPLOYERS MUTUAL INSURANCE AND SERVICE COMPANY,

Petitioners,

vs.

BUCKBEE, MEARS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF PETITIONERS.

MORTON BARROWS,
GEORGE P. METCALF,
Attorneys for Petitioners,
1604 Pioneer Building,
Saint Paul, Minnesota.

WALTER L. CLARK,
Baltimore, Maryland,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 854

JAMES W. BOTHWELL, WILLIAM J. MICHEL, C. STANLEY HURLBUT, WILLIAM E. THOMSEN, ARTHUR M. SIEGK, RECEIVERS OF EMPLOYERS MUTUAL INSURANCE AND SERVICE COMPANY,

Petitioners,

vs.

BUCKBEE, MEARS COMPANY,

Respondent.

BRIEF OF PETITIONERS.

The defendant in error invokes the familiar rule that a chancery receiver connot sue in a state other than the court appointing him.

No such question was raised at the trial of this case or upon the appeal to the Supreme Court of the state. Before commencing suit the receiver applied to the state court for permission to sue and this permission was granted. The order of the court granting permission to sue is found on the first page of the record in this court, and it

will be observed that at no time was any exception taken to the order or any attack made upon it. The state court at no time had an opportunity to pass on the question whether the receivership in question was of the character which entitled the receivers to maintain an action in the Courts of Minnesota. The record contains no evidence as to the statutes of Maryland under which the receiver was appointed nor was the order of the court of Maryland appointing the receiver offered in evidence. All this resulted from the fact that the case was tried on a stipulation of facts and the defendant at no time asserted that the plaintiffs were without authority to sue.

The Supreme Court of Minnesota has held that a foreign receiver may sue in the courts of Minnesota. In the case of Comstock v. Frederickson, 51 Minn. 350, the state court says:

> "Where there are no domestic creditors whose rights are to be protected the courts of the state will recognize a non-resident receiver and permit him to prosecute an action therein or move to set aside a judgment fraudulent as to creditors represented by him in virtue of the comity existing between the states".

It is submitted that in view of the failure of the defendants to raise any question as to the propriety of the plaintiffs maintaining this action in Minnesota, the order of the State Court authorizing the action, and the decision of the Supreme Court of Minnesota above referred to, it is now too late to assert the objection raised in the brief of defendant in error.

While the statutes of Maryland relating to the appointment of receivers are not contained in the record in this case and are not passed upon by the Supreme Court of

Minnesota, it seems to the plaintiff in error that the statute brings the case within the line of decision of this court following the case of Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. R. 755.

Section 51 of Article 48A, Annotated Code of Maryland provides as follows:

> "Whenever the insurance commissioner shall have reason to believe that any insurance company is insolvent or fraudulently conducted or that its assets are not sufficient for carrying on the business of the same, or during any non-compliance with the provisions of this Article, it shall be his duty to make complaint thereof to the Judge of either of the Circuit Courts of Baltimore City * * * which Judge shall upon requisitions of the commissioner appoint a commission consisting of the insurance commissioner and two disinterested and competent persons whose duty it shall be to examine into the business of said company and report in writing the result of said examination to the Judge appointing them, who shall if in his judgment the charges of insolvency, fraud, neglect, or abuse as charged by the insurance commissioner are sustained by the said report, at once issue an injunction suspending the business of the company. The commissioner shall institute or cause to be instituted the necessary proceedings under the laws of this state to close the affairs of any insurance company of this state which shall appear upon examination to be insolvent or to be fraudulently conducted."

Section 92 of Article 23 provides:

> "Whenever any corporation of this state other than a railroad shall have been determined by legal proceedings to be insolvent or shall be proven to be insolvent by proof offered under any bill filed under the provisions of this section, it may be dissolved after a hearing according to the practice of the Courts in

equity in this state upon a bill for that purpose filed in a court of equity of the County or City in which its principal office is located."

Section 94 provides as follows:

"Whenever any corporation shall be dissolved by the decree of any courts of this state its property shall be vested in its receivers appointed, etc." * * *

It appears from the records in this case that prior to the receivership the assessment sued upon was levied by the company and subsequently these receivers were duly appointed by the Circuit Court of Baltimore City and brought this action to recover the assessment.

The assessment being part of the assets of the corporation it vested in the receiver with the other property of the corporation upon appointment of the receivers and the case seems to come within the principle of the Bernheimer case above cited.

MORTON BARROWS,
GEORGE P. METCALF,
Counsel for Plaintiffs in Error.

WALTER L. CLARK,
Baltimore, Maryland,
Of Counsel.